Supreme Court of Tennessee.

WILLIAM JOHNSON ET AL. *v.* NEWTON HACKER.

A special act of the legislature, giving time to a particular tax collector to collect and account for the taxes, operates to release his sureties.

BILL in equity. Complainants were sureties of David Fry, as tax collector for Greene county. On the 26th of April 1866, the legislature passed an act allowing Fry the further time of six months to collect and account for the taxes. The question raised by the bill was whether this extension of time to the tax collector released his sureties?

The opinion of the court was delivered by

NICHOLSON, C. J.—As between individuals, it is well settled that whenever the right of the principal to sue is, for the time, gone, so that if he sued, the principal debtor could set up the contract against him successfully as a defence, then he can equally set up the defence against the surety claiming to be substituted to the creditor's right. This makes it necessary that it should be a binding and obligatory contract, capable of being enforced. A mere gratuitous indulgence, or promise of indulgence, being *nudum pactum*, nor capable of enforcement, has no such effect: 9 Yerg. 32; 3 Hum. 412. It is insisted that upon these principles the sureties of Fry were not released by the extension of time given to him by the legislature, because the sureties had the right, notwithstanding the legislative act giving time, to pay the debt and sue the principal debtor. But could the sureties sue the principal successfully? Would not the legislative act of indulgence preclude the sureties from collecting the debt from the principal debtor? This must depend upon the legal effect of the legislative act. If it has the force and effect to protect the principal debtor against suit by the state, then of course it would protect the principal debtor from suit by his sureties. The Attorney-General says that "a private act to give indulgence to a state debtor is not in the nature of a partial law, but a mere business direction. Legislation of a general character, for the government of the people, is essentially different from laws to administer the revenue. The one must needs be general for the protection of the people; the other must needs be applied to the particular case, and be, in many instances, restricted

to one case, one payment, &c., And further: "Then a particular law giving indulgence must be construed as a law touching the officers of the state—those whom she has a right to control by partial laws—not to a particular man or men, whom she has no right to direct, except by general laws." In another part of his argument the Attorney-General, after stating that the state is not bound by a voluntary direction given to its officers, says: "It is only directory to the officers of the state. They are precluded from suit; the surety is not." We understand from all this that the Attorney-General concedes that the act giving time to Fry may be valid as a business direction; that it operates upon the officers of the state whose business it is to collect the revenue; that these officers are precluded from suing by the act giving indulgence. But he insists that the state itself is not bound not to sue, and hence there was no suspension of her right. It results, if this argument is sound, that the legislature precluded the Comptroller and Attorney-General from suing Fry during the time of indulgence given, but yet his sureties were not thereby prevented from suing him, or compelling the state to sue him, notwithstanding the act giving time. It is scarcely necessary for us to say, that the sureties could not prosecute a suit against the state to compel her to sue the principal debtor. This would be a violation of the familiar principle, that the sovereign can only be sued with his consent. Then, could the sureties pay the debt and sue the principal debtor? The legislature had protected the principal debtor from suit, by forbidding the Comptroller and Attorney-General and Circuit Judge to enforce collection by suit. It is conceded by the Attorney-General that this prohibition is binding on the officers of the state. The state operates alone through its officers. If their hands are tied by a valid legislative act, we are unable to understand how the sureties are to proceed to sue, and collect by suit from their principal debtor, a debt which the state has forbidden her own officers to collect from him by suit. We understand that on the subject of revenue the sovereignty of the state is represented by the legislature, and a legislative act is passed which forbids the officers of the state to sue the debtor of the state. This operates necessarily to protect the debtor from suit, as well by the sureties as by the officers of the state. It is true the state, through the legislature, may repeal the act of indulgence, but until such

repeal it is binding, and the state is incapable of enforcing the debt, except through the repeal of the act by the legislature. Until such repeal, the suspension of the right to sue is complete, and the sureties can have no remedy, either against the state or the principal debtor.

If follows that the legislative indulgence given to Fry, as it was not repealed, operated to discharge his sureties. It follows that the Chancellor's decree overruling the demurrer was correct, and is affirmed with costs. The cause will be remanded.

McFARLAND, J., dissented.

The important question in regard to the continued responsibility of the surety, where further time is given to the principal, is, how far the responsibility of the surety is thereby altered or modified. It is, perhaps, not important whether as a question of fact to be determined by the jury, his position is thereby rendered essentially worse or not. The surety is entitled to stand upon the very terms of his contract, and may insist he will not be thrown upon any other, even where a jury might regard them as no more hazardous or onerous. The obligation of suretyship is unquestionably one *strictissimi juris*, and the surety may insist it shall not be changed in one iota. By "changed" we mean legally changed, so that the surety cannot enforce all his rights in the matter, both as to the principal debt and the creditor, and his remedies against the principal debtor for his indemnity, in precisely the same manner No doubt there are many merely permissive indulgences constantly extended to the principal debtor by the creditor, which may very seriously impair the ultimate risk of the surety. But as these are mere omissions of imperfect duties on the part of the creditor, and which the surety is not legally bound to regard in his dealing with the matter, he cannot object, that his actual legal position is thereby affected.

But in the present case it seems very obvious that the position of the surety was not only changed, in that six months' more time was extended to the principal debtor in which to perform his duty, but the risk and responsibility of the surety was clearly thereby proportionally enhanced. If the principal debtor thereby legally obtained more time to perform his duty, as to the creditor, it is difficult to comprehend how the surety could, upon any fair basis of argument or construction, be justly said to be in precisely the same position. No doubt, as is very common of late, the extension of time might have been made subject to the consent of the surety, or saving all rights of the surety, and thus have escaped all peril of releasing the surety. But there is no pretence of anything of the kind. It seems to us the case is presented with great fairness and force in the opinion of the court, and we need not refer to the decided cases upon a topic so familiar to the profession. They are given in detail in the argument of counsel, but we have not space for their insertion here. We give the case because it presents the question of the obligation of suretyship, in a new form, and one which the profession will be glad to know of.

I. F. R.